92-552

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In the Supreme Court of the United States

OCTOBER TERM, 1992

JOE ALLEN BAKER, M.D.,

Petitioner,

v.

GULF + WESTERN INDUSTRIES, INC.,
GULF + WESTERN FOOD PRODUCTS CO.,
RISK MANAGEMENT SERVICES, INC.,
and FRANK B. HALL, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

A. Whether Patterson v. McLean Credit Union, 491 U.S. 164 (1989), Controls in a Case Where Relief Under Title VII is Unavailable to the Plaintiff?

B. Whether the Civil Rights Act of 1991 Should be Applied Retroactively?

C. Whether This Court Should Allow the Subjection of an Arbitrary Class of Innocent Parties to Manifest Injustice?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were petitioner, Joe Allen Baker, M.D., and respondents, GULF + WESTERN INDUSTRIES, INC., GULF + WESTERN FOOD PRODUCTS CO., RISK MANAGEMENT SERVICES, INC., and FRANK B. HALL, INC. The same parties are before this Court.

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Joe Allen Baker, M.D., respectfully petitions this Court to issue a writ of certiorari to review the decisions of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The denial of rehearing by the Court of Appeals for the Eleventh Circuit is unreported and is reprinted in the Appendix hereto ["App."], at ix. The unreported decision by the Court of Appeals for the Eleventh Circuit affirming the district court is reprinted in App. at ii.

The Final Judgment of the U.S. District Court for the Southern District of Florida, the Hon. Norman C. Roettger, Jr., presiding (Case No. 88-8188-CIV-ROETTGER), is unpublished and is printed in App. at xii. The unpublished Order of the district court granting summary

judgment in favor of defendants is printed in App. at iv.

JURISDICTION

Jurisdiction in the U.S. District Court for the Southern District of Florida was predicated upon 28 U.S.C. §1343, as Plaintiff-Petitioner claims that Defendants-Respondents have violated his civil rights protected by 42 U.S.C. §1981.

An appeal to the Eleventh Circuit was taken pursuant to 28 U.S.C. §1291. Petitioner now invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case implicates 42 U.S.C. §1981, which provides:

> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same

> right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) Definition
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. §1981 (as amended by the Civil Rights Act of 1991).

STATEMENT OF THE CASE

Petitioner Joe Allen Baker is a white male who practiced medicine in Belle Glade, Florida, and who for many years treated Gulf + Western's ["G&W's"] domestic and foreign employees for job-related injuries. G&W Statement of Material Facts, R7-246. G&W annually employed several thousand seasonal sugar cane cutters imported to the United States under limited work visas through the British West Indies Central Labor Organization. Id. Virtually all of these workers, known as "BWIs," were black men from the Caribbean.

For years, Dr. Baker was paid in one manner for domestic workers and in another manner for BWIs. Baker

Affidavit 5.[1] The pay scale for the medical services provided to domestic employees was in accordance with the Florida workers' compensation schedule, which required that an "individual health-care provider . . . be paid either his usual and customary charge for a treatment or service, or the maximum charge, which ever is less." Fla. Stat. ch. 440.13 (1979). The pay scale for providing medical services to BWIs, however, was a flat rate, regardless of whether the medical service was a simple office visit or an amputation. Dr. Baker was told that the flat rate (or "contract medical rate"), would simplify the payment process for medical services to the BWIs. Baker

[1] Dr. Baker's affidavit was included, along with other affidavits and depositions, in the Appendix to Plaintiff's Response to Defendants' Motions for Summary Judgment.

Affidavit 5.

Each year, a new contract for medical services would be negotiated at the end of the sugar cane growing season, i.e., during the summer, in anticipation of the next season, which would begin in September or October. R6-231-85. These new contracts were usually oral and were confirmed by a handshake. R6-231-82.

Over the years, Dr. Baker came to believe that the contract medical rate for the BWIs was not motivated by a desire for efficiency, but rather was part of a pattern of racial discrimination by the employers against the black BWIs. Baker Affidavit 9. He had noted the general trend toward mistreatment of BWIs in working conditions, housing, food and other conditions of employment. Id. at 3. By

1978, the contract medical rate was only one-half the average rate for domestic employees, id., yet the injuries sustained by the BWIs (who worked in the fields with machetes), were generally more severe than those of the domestic employees (who did not). Id. at 6.

Dr. Baker complained to G&W and other companies about the use of the BWI flat rate. Id. at 6, 9. In late 1978, he contracted with another sugar company that, beginning January 1979, medical services for both domestic and BWI employees would be billed in accordance with the workers' compensation fee schedule. Id. at 9-10. Dr. Baker informed G&W that he would commence billing them in the same manner. Id. at 10-11. Beginning in January 1979, he began billing G&W for medical services for the BWIs under the workers'

compensation fee schedule, just as he did for domestic employees. Id. at 10.

In April of 1980, Palmer Pierce, a representative of Risk Management Services ["RMS"] (the claims administrator for G&W), met with Dr. Baker to discuss his billings for the past season, which had not yet been paid. R6-231-30 to 32; see also Risk Management Services' Statement of Material Facts ["RMS Facts"], R8-254-1. This meeting was motivated in part by an audit G&W had performed with respect to RMS, which was critical of RMS's efficiency. RMS Facts, R8-254-2. At that meeting, Pierce informed Dr. Baker that the relationship among Baker, RMS, and G&W was good, and that the quality of Baker's medical care was good, but that the basic problem involved the amount of his bills for services to the

BWIs. R6-231-34-38. Due to Dr. Baker's refusal to bill medical care for BWIs at a lower rate than for domestic employees, the average cost of his treatment of BWIs was 25% to 30% above the average charged by other physicians. RMS wanted Baker to return to the flat rate method for BWIs while remaining at the higher workers' compensation rate for domestic workers. R6-231-38-39.

In the summer of 1980, Dr. Baker met with Tony Alvarez (assistant general manager of G&W's Okeelanta sugar mill), a Mr. Corrhia, and a man later identified as Richard Sanchez (a vice-president of G&W). See R7-240. Dr. Baker believed that Sanchez was at the meeting to approve a new contract for the next crop season, and that he did so; G&W has denied that Sanchez had such

authority.[2] R10-285-12 to 17. Dr. Baker reaffirmed that he would not enter into a new contract containing the flat rate for BWIs. R10-285-27.

Thereafter, G&W contracted with another physician, Dr. Raul Ramos, to provide the treatment for its employees. G&W Facts, R8-254-3-2. At the time, Dr. Baker believed that a new contract had been authorized, and was never informed

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[2] The district court incorrectly found: "The allegations of Plaintiff's complaint do not relate to the making or enforcement of contracts but to conduct by the Defendant GULF WESTERN INDUSTRIES after the contract relation had been established." App. at vi.

In fact, there was a material dispute as to whether a new contract had been entered. G&W has consistently denied that it entered into a new contract with Dr. Baker for the 1980-81 growing season. See R14-359-13 (Transcript of Hearing on Summary Judgment) (Counsel for G&W: "This defendant, we will concede, denied in his Answer that there was a contract.").

Thus the district court erred in granting summary judgment on these disputed material facts.

otherwise. Baker Affidavit 11. The first time he heard there had been a change was in September when he was informed that G&W patients were going to Dr. Ramos. Id.

Dr. Baker contends that G&W's failure to enter into a new contract with him was the result of his refusal to agree to a flat rate for the BWIs.

HISTORY OF THE CASE

Dr. Baker filed his complaint on April 4, 1984, see Record, Vol. 1, docket entry #1 [R1-1]. The District Court originally dismissed Dr. Baker's §1981 claim as untimely. R1-13, 16. The Eleventh Circuit reversed and remanded. See Baker v. Gulf & Western Industries, Inc., 850 F.2d 1480 (11th Cir. 1988).

On remand, both sets of Defendants moved for summary judgment. R7-237, R8-

256. The parties filed extensive appendices, including numerous depositions and affidavits. R7-243; R10-285 to 287; R11-288 to 295.

After the Defendants' motions for summary judgment had been filed, but before the hearing on those motions, Dr. Baker moved to amend his complaint. R13-319. Defendant G&W opposed that motion, R13-322, and Dr. Baker filed a lengthy response to G&W's opposition, R13-322, 325. The District Court held a hearing on Defendants' motions for summary judgment. R14. With respect to Dr. Baker's §1981 claim, the District Court relied upon Patterson v. McLean Credit Union, 491 U.S. 164 (1989), and granted summary judgment in favor of Defendants. R13-327. The District Court later entered a final judgment, which also denied Dr. Baker's motion to

amend his complaint. R13-330.

Dr. Baker timely filed a Notice of Appeal. R13-353. On April 17, 1992, a panel of the Eleventh Circuit, without issuing an opinion, affirmed the District Court's judgment. See App. at ii. The Eleventh Circuit denied Baker's motion for rehearing on June 26, 1992.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition to resolve three important issues. First, this Court should clarify the extent of its holding in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). Second, this Court should examine the interaction between that decision and the Civil Rights Act of 1991, passed by Congress to overrule Patterson. Specifically, this Court should determine whether the 1991 Act should be applied retroactively. The

issue of retroactivity is also presented to this Court in another petition now pending before this Court. See Mozee v. American Commercial Marine Service Co., 963 F.2d 929 (7th Cir. 1992), pet. for cert. filed, No. 92-248, 61 U.S.L.W. 3150 (Aug. 5, 1992). Finally, this Court should refuse to allow the subjection of an arbitrary class of innocent parties to manifest injustice.

I. THIS COURT SHOULD CLARIFY WHETHER ITS DECISION IN PATTERSON v. McLEAN CREDIT UNION APPLIES WITH FULL FORCE IN THOSE CASES WHERE RELIEF IS UNAVAILABLE TO PLAINTIFFS UNDER TITLE VII

As Dr. Baker cannot maintain an action under Title VII, Patterson v. McLean Credit Union, 491 U.S. 164 (1989), does not require that he be denied relief for postformation conduct under §1981.

In Patterson, this Court addressed the issue of the interaction between 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. That issue was framed within the narrow context of an employee's claim which could, at least prior to Patterson, have been brought under either §1981 or Title VII.[3]

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[3] Admittedly, many cases claiming violations of §1981 arise from claims of racial discrimination in employment. See Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

However, employment claims do not constitute the universe of possible §1981 actions. See, e.g., Runyon v. McCrary, 427 U.S. 160, 167 (1976) (contracts for education services by private schools); Scott v. Young, 307 F.Supp. 1005 (E.D. Va. 1969), aff'd, 421 F.2d 143 (4th Cir.), cert. denied, 398 U.S. 929 (1970) (§1981 prohibits discrimination by private recreational facilities); New Orleans City Park Improvement Assn. v. Detiege, 252 F.2d 122 (5th Cir.), aff'd, 358 U.S. 54 (1958) (§1981 bars discriminatory denial of equal access to public park); Jennings v. Patterson, 488 F.2d 436 (5th Cir. 1974) (same for equal access to public street); Scott v. Eversole

Justice Kennedy's opinion for the majority reasoned that an employer's discriminatory conduct during employment, "reprehensible though it be if true, is not actionable under §1981 . . . . Rather, such conduct is actionable under the more expansive reach of Title VII of the Civil Rights Act of 1964." Patterson, 491 U.S. at 179-80. The majority added:

> Interpreting §1981 to cover postformation conduct unrelated to an employee's right to enforce his or her contract, such as incidents related to the conditions of employment, is not only inconsistent with that statute's limitation to the making and enforcement of contracts, but would also undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims.

Id. at 180 (emphasis added).

Mortuary, 522 F.2d 1110 (9th Cir. 1975) (refusal to provide funeral for Native American actionable under §1981).

After a discussion of the "elaborate administrative procedure" utilized by the Equal Employment Opportunity Commission in administering Title VII, the Patterson Court took pains to note: "Where conduct is covered by both §1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter. . . . [W]here the statutes do in fact overlap we are not at liberty 'to infer any positive preference for one over the other'." Id. at 181 (emphasis added), quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

Implicit in the language emphasized above is the realization that some conduct is covered by one statute but not by the other. Thus, Patterson held that §1981 did not, within the context of an employment contract, prohibit

racial discrimination after the making of that contract. Patterson did not, however, hold that §1981 was inapplicable to postformation discriminatory conduct in the context of some other type of contract.

Indeed, even in the portion of the Patterson opinion interpreting the scope of §1981's coverage, this Court reasoned that the right to make contracts "extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment." Patterson, 491 U.S. at 176 (emphasis added). Thus, this Court's rationale in Patterson simply cannot be divorced from the narrow context -- contracts of employment -- presented in that case.

As a result, the Patterson rationale does not control a §1981 case

-- such as the instant one -- involving claims which cannot be brought under Title VII. Dr. Baker could not avail himself of the protections available under Title VII, because he was not an employee of the Defendants. He was an independent, professional contractor, who contracted with G&W to provide medical services; as such, he was the antithesis of the class -- "employees" -- which Congress sought to protect by enacting Title VII. See 42 U.S.C. §2000e(f); Krijn v. Pogue Simone Real Estate Co., 752 F.Supp. 102, 104-05 (S.D.N.Y. 1990), affirmed sub nom. Krijn v. Simone, 930 F.2d 910 (2d Cir. 1991) (independent contractors are not employees).

This Court's refusal to overrule Runyon v. McCrary, 427 U.S. 160 (1976), is, therefore, extremely significant.

See Patterson, 491 U.S. at 171. Runyon exemplified the precise situation where there is no overlap between Title VII and §1981. The African-American parents in Runyon could not have based their action upon Title VII. No employment contract was at issue. Rather, the contract that the parents sought to make involved the provision of (educational) services. Likewise, in the instant case, the contract Dr. Baker attempted to make involved the provision of (medical) services.

Thus, this Court's refusal to overrule Runyon indicates that §1981's scope could cover postformation conduct in those cases where another statutory remedial scheme is unavailable to an aggrieved plaintiff.

Giving an overly broad reading to Patterson (as the courts below did),

will significantly sacrifice the coverage of the civil rights laws Congress has enacted. Indeed, if this Court's decision in Patterson were construed overly broadly -- to encompass all actions filed under §1981, including those claims not actionable under Title VII -- the lower courts will be faced with precisely the situation this Court sought to avoid. As the Patterson Court reasoned, a narrow reading of §1981 in employment discrimination cases would "preserve the integrity of Title VII's procedures without sacrificing any significant coverage of the civil rights laws." Patterson, 491 U.S. at 181-82.

This Court should clarify the limits of Patterson. If the decision of the Eleventh Circuit is allowed to stand, employers will be able to evade both Title VII and §1981 by making their

employees independent contractors, who would then have no protection against postformation discrimination. As a result, it would be impossible to fulfill the worthy purposes of those statutes.

II. THIS COURT SHOULD DETERMINE WHETHER THE CIVIL RIGHTS ACT OF 1991 SHOULD BE APPLIED RETROACTIVELY

If Patterson does apply to the instant case, this Court should determine whether the Civil Rights Act of 1991 applies retroactively, thereby allowing Dr. Baker to seek relief under that Act.

Congress passed the Civil Rights of 1991 to, inter alia, overrule this Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). The Civil Rights Act of 1991 nullifies Patterson by defining the term "make and enforce contracts" contained in §1981 to

include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. §1981(b).

The Act is silent regarding its application to cases pending on the date of its enactment and to cases which were filed before Patterson was decided. It provides: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Civil Rights Act of 1991, §402(a).

However, the legislative history suggests that the Bill provisions intended to overrule Patterson were to apply to cases pending on the date of the Supreme Court decisions that the provisions overruled. That is, that the

Act was to have retroactive effect with regard to its amendment of §1981. See H. Rep. No. 102-40(I), 102d Cong., 1st Sess. 94, reprinted in 1991 U.S. CODE CONG. & AD. NEWS 549, 632; H. Rep. No. 102-40(II), 102d Cong., 1st Sess. 38, reprinted in 1991 U.S. CODE CONG. & AD. NEWS 694, 732.

This Court should resolve whether that Act is to be applied retroactively.

A. This Court Should Resolve Its Differing Lines of Authority Regarding the Application of New Statutes to Pending Cases

There are "two seemingly contradictory lines of cases" governing retroactivity from this Court. Mozee v. American Commercial Marine Service Co., 963 F.2d 929, 935 (7th Cir. 1992), pet. for cert. filed, No. 92-248, 61 U.S.L.W. 3150 (Aug. 5, 1992). On the one hand, this Court has ordered courts to apply

the law in effect at the time of decision. On the other hand, this Court has refused to apply statutes retroactively in the absence of specific congressional direction.

One line of authority commands courts to apply the law in effect at the time they render a decision. This presumption first arose in United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801), in which this Court had to decide whether to apply a newly enacted treaty to a pending case. Speaking for the Court, Chief Justice Marshall stated: "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." 5 U.S. (1 Cranch) at 110. Since the treaty expressly

mandated its application to pending cases, Marshall applied the law retroactively. The case, however, did not address whether a change in law could be applied to pending cases if there were no explicit language commanding that effect.

This Court eventually addressed that question in Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969). The Thorpe Court held: "The general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." Id. at 281. Under this formulation, pending cases are to be decided under existing law enacted after the accrual of the cause of action. The Court did not distinguish between statutes and administrative regulations. See 393 U.S. at 282.

In Bradley v. School Board of City of Richmond, 416 U.S. 696, 715 (1974), this Court reinforced Thorpe by refusing to hold that changes in the law are to be given retroactive effect only where that is the "clear and stated intention of the legislature." Instead, this Court explained: "even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." Id.

The Bradley Court declared that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711. Indeed, the Bradley Court held that when the legislative history supports either

position, there is implicit support for applying the statute to pending cases. Id. at 715-16 & n.23.

Under an alternate line of authority, this Court has suggested that retroactivity is not favored. Under this approach, "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). Although Bowen dealt with retroactive rulemaking, this Court applied the canon of construction that "[s]tatutes are not to be given retroactive effect . . . unless the legislative purpose so to do plainly appears." United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-63 (1928).

This Court itself recently acknowledged that the Bradley and Bowen cases are in "apparent tension," but nonetheless declined to resolve them, holding only that "where the congressional intent is clear, it governs." Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990).[4]

B. This Court Should Resolve the Differing Approaches Taken by the Lower Courts in Applying the Civil Rights Act of 1991 to Pending Cases

These two seemingly contradictory lines of this Court's precedent have created a muddle in the lower courts. The two conflicting approaches force federal courts faced with the

[4] In refusing to apply the amended statute to the case before it, the Kaiser Aluminum Court concluded that "the plain language of both the original and amended versions of [the statute] is not applicable to judgments entered before its effective date." Id. at 838.

retroactivity issue to choose one presumption over the other. Each of the presumptions has found adherents in the federal courts. Kaiser Aluminum only magnified the irreconcilable nature of the competing doctrines.

The case law interpreting the Civil Rights Act of 1991 reflects the dual approaches. For examples of courts that have applied the act retroactively, see Stender v. Lucky Stores, Inc., 780 F.Supp. 1302 (N.D. Cal. 1992); King v. Shelby Medical Ctr., 779 F.Supp. 157 (N.D. Ala. 1991); Davis v. Tri-State Mack Distributions Inc., 57 Fair Empl. Prac. Cas. (BNA) 1025 (E.D. Ariz. 1991). See also Grahm v. Bodine Elec. Co., 782 F.Supp. 74 (N.D. Ill. 1992); Bristow v. Drake Street, Inc., 57 Fair Empl. Prac. Cas. (BNA) 1367 (N.D. Ill. 1992); La Cour v. Harris Co., 57 Fair Empl. Prac.

Cas. (BNA) 622 (S.D. Tex. 1991).

The Fifth, Sixth, Seventh, and Eighth Circuits have held that at least certain sections of the Act do not apply retroactively. See Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992); Johnson v. Uncle Ben's, Inc. 965 F.2d 1363 (5th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992), pet. for cert. filed, No. 92-248, 61 U.S.L.W. 3150 (Aug. 5, 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992). See also Burchfield v. Derwinski, 782 F.Supp. 532 (D. Colo. 1992); Khandelwal v. Compuadd Corp., 780 F.Supp. 1077 (E.D. Va. 1992); Hansel v. Public Serv. Co., 778 F.Supp. 1126 (D. Colo. 1992); Van Meter v. Barr, 778 F.Supp. 83 (D.D.C. 1991); Johnson v.

Rice, 58 Fair Empl. Prac. Cas. (BNA) 31 (S.D. Ohio 1992); High v. Broadway Indus., Inc., 57 Fair Empl. Prac. Cas. (BNA) 1159 (W.D. Mo. 1992); James v. American Intl. Recovery, Inc., 57 Fair Empl. Prac. Cas. (BNA) 1226 (N.D. Ga. 1991).

These contrasting approaches in statutory construction taken by the federal courts mirror the competing presumptions. A determination of which presumption to apply necessarily reflects that court's approach to statutory construction, which, in turn, reflects the court's view about the role of courts in a tripartite system. The irreconcilable outcomes among the courts reflect the unworkability of the present rules of construction. This Court must determine exactly which construction should be followed.

C. The Civil Rights Act of 1991 Should be Applied Retroactively Because Congress Has Not Directed Otherwise and Because Such Application is Consistent With the Law in Effect at the Time of the Challenged Conduct

Bradley stands for the proposition that laws will be applied retroactively unless Congress directs otherwise or if doing so will result in "manifest injustice." Bradley, 416 U.S. at 711. This Court set forth three methods of identifying manifest injustice that would preclude retroactive application of a law: (1) the nature and identity of the parties; (2) the nature of the rights affected; and (3) the impact of the change in law on preexisting rights. See id. at 717.

1. The Nature and Identity of the Parties

This test concerns the relative power and resources of the parties.

While cause for concern would certainly arise if the Act targeted a vulnerable group, the nation's employers hardly qualify as a defenseless entity. Employers expressed a strong voice during the shaping of the Act, and their lobbyists played an integral role in compromise negotiations. See Joan Biskupic, Job Discrimination Legislation Roils Business Community, 49 Cong. Q. 989 (1991). Furthermore, most employers are represented in litigation by experts and corporate counsel. Their resources are generally quite substantial. By contrast, the victims of discrimination often have few if any resources, and often take tremendous risks to pursue claims. See Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989) (Posner, J.).

Furthermore, the Bradley Court emphasized the difference between "mere private cases between individuals," Bradley, 416 U.S. at 717 (quoting Schooner Peggy, 5 U.S. (1 Cranch) at 110), in which application of a new law to existing claims may be inappropriate, and litigation involving "great national concern," Bradley, 416 U.S. at 719, where application of a new statute to existing claims is presumed, absent clear congressional intent to the contrary. The Bradley Court noted that Title VII was an area of public, rather than private, concern where the plaintiff functions "as a 'private attorney general'; vindicating a policy that Congress considered of the highest priority." 416 U.S. at 718-19 (citation omitted). Similarly, vindicating rights under §1981 places a plaintiff in the

role of a private attorney general. Accordingly, the findings and purposes of the Civil Rights Act of 1991 meet the first test articulated in Bradley.

2. The Nature of The Rights

In Bradley, the Court stated it would refuse to apply an intervening change to a pending action where it had concluded that to do so would infringe upon a right that had vested. 416 U.S. at 720. In this case, the defendant never, even under 1989 case law, had a vested right to discriminate in the delivery of medical services or to enter into racially discriminatory contracts. Furthermore, the procedures and remedies available to plaintiff now are identical to those obtainable when the challenged conduct occurred. Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986) (§1981 applies to postformation contract

conduct); Lucero v. Beth Israel Hospital, 479 F.Supp. 452, 453-55 (D. Colo. 1979) (same). See also cases cited in note 5, infra. Therefore, the nature of the defendant's rights has not changed.

3. Nature of the Impact of the Change of the Law Upon Those Rights

The Civil Rights Act of 1991, under this test, should be applied to an existing claim unless that would alter after-the-fact legal standards that existed and were relied upon by the defendant at the time of the challenged conduct. See Bradley, 416 U.S. at 720.

To deprive plaintiffs of the Act's remedies and restored legal standards would give defendants an unwarranted windfall. Applying the Act retroactively to pending cases based on pre-Patterson conduct will actually

protect the interests that arose before 1989 and that are attached to cases still winding through the system. For such sets of cases, it is impossible to argue that retroactive application disturbs expectation interests or deprives parties of notice. "[T]here is little injustice in retroactively depriving a person of a right, however valuable, which was created contrary to his bona fide expectations at the time he entered the transaction from which the right arose." Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 720 (1960).

III. REFUSAL TO APPLY THE ACT RETROACTIVELY WOULD ARBITRARILY WORK A MANIFEST INJUSTICE UPON INNOCENT PARTIES

Denying retroactive application of the 1992 Act will arbitrarily create a class of persons (including Dr. Baker) with no recourse for the redress of civil rights violations.

Before this Court's decision in Patterson, all the Courts of Appeals had held that §1981 prohibited postformation conduct.[5] By passing the Civil Rights

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[5] See Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 201-03 (1st Cir. 1987); Richards v. New York City Bd. of Educ., 668 F.Supp. 259, 267 (S.D.N.Y. 1987), aff'd mem., 842 F.2d 1288 (2d Cir. 1988); Liotta v. National Forge Co., 629 F.2d 903, 906 (3d Cir. 1980), cert. denied, 451 U.S. 970 (1981); Patterson v. American Tobacco Co., 535 F.2d 257, 262 (4th Cir. 1976); Hernandez v. Hill Country Tel. Coop., Inc., 849 F.2d 139, 143-44 (5th Cir. 1988); Grubb v. W.A. Foote Memorial Hosp., 533 F.Supp. 671, 675-76 (E.D. Mich. 1981), aff'd, 759 F.2d 546 (6th Cir.), cert. denied, 479 U.S. 946 (1985); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986); Taylor v. Jones, 653 F.2d 1193, 1198-99 (8th Cir. 1981);

Act of 1991, Congress clearly reaffirmed that postformation discriminatory conduct was unlawful. See 42 U.S.C. §1981(c).

Thus, racially discriminatory conduct was actionable before the Patterson decision. The same conduct is actionable after the passage of the 1991 Act. Refusal to apply that Act retroactively will create a manifest injustice upon those persons whose cases were pending at the time of the Patterson decision. The creation of such an arbitrary class would be completely antithetical to the "policy of the Nation . . . [to move] constantly in the direction of eliminating racial

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Satterwhite v. Smith, 744 F.2d 1380, 1383 (9th Cir. 1984); Foster v. MCI Telecommunications Corp., 773 F.2d 1116, 1120 (10th Cir. 1985); Stallworth v. Shuler, 777 F.2d 1431, 1433 (11th Cir. 1985); Metrocare v. WMATA, 679 F.2d 922, 928 (D.C. Cir. 1982).

segregation in all sectors of society." Runyon v. McCrary, 427 U.S. 160, 191 (1976) (Stevens, J., concurring).

In sum, retroactive application of the Act does not implicate any of the concerns that make retroactivity potentially undesirable. The Act restored prior understandings of §1981, see Civil Rights Act of 1991, §3(4). Retroactive application of the Act will serve the legislative goal to eradicate discrimination from the American workplace.

This Court should grant a writ of certiorari, in order to address whether the Civil Rights Act of 1991 is to be applied retroactively.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the U.S. Court of Appeals for the Eleventh Circuit, and order full briefing and oral argument on the merits of this case.

Respectfully Submitted,

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**APPENDIX TO THE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 91-5068

D. C. Docket No. 84-8188-Civ-NCR

JOE ALLEN BAKER, M.D.,

Plaintiff-Appellant,

versus

GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN WESTERN FOOD PRODUCTS CO., RISK MANAGEMENT SERVICES, INC., FRANK B. HALL, INC.,

Defendants-Appellees.

Appeal from the United States District Court For the Southern District of Florida

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(April 17, 1992)

Before HATCHETT, Circuit Judge, JOHNSON and HENDERSON*, Senior Circuit Judges.

PER CURIAM:

Affirmed. See Circuit Rule 36-1. "Costs taxed against plaintiff-appellant."

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*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Judgment Entered: April 17, 1992

For the Court: Miguel J. Cortez, Clerk

By: /s Karleen McNabb

Deputy Clerk

ISSUED AS MANDATE: **JUL 10 1992**

JOE ALLEN BAKER, M.D.,
Plaintiff,

v.

GULF WESTERN INDUSTRIES, INC., etc., et al.
Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.:88-8188-CIV-ROETTGER
ORDER

THIS CAUSE is before the Court on motion of Defendants for summary judgment of this cause. Upon consideration of the motion and the record in this cause, the court finds as follows.

Plaintiff JOE ALLEN BAKER was under contract with Defendant GULF WESTERN INDUSTRIES to provide medical services for Defendant's employees. Plaintiff alleges that Defendant GULF WESTERN INDUSTRIES paid lower rates for

the medical treatment of black seasonal harvest workers than other GULF WESTERN INDUSTRIES employees. Plaintiff contends when he refused to discriminate between employees, he was terminated. Plaintiff brings claims for violation of 42 USC § 1981, intention [sic] infliction of emotional distress and breach of contract.

In Patterson v. McLean Credit Union 109 S.Ct. 2363, 2373 (1989), the Supreme Court defined the scope of 42 USC § 1981 holding:

> Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of

> contracts . . . . the right to make contracts does not extend . . . to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions.

The allegations of Plaintiff's complaint do not relate to the making or enforcement of contracts but to conduct by the Defendant GULF WESTERN INDUSTRIES after the contract relation had been established. Therefore, there can be no claim based on 42 USC § 1981.

Also, Plaintiff JOE ALLEN BAKER has failed to sustain its Celotex burden with regard to his claims for intentional infliction of emotional distress. Plaintiff fails to allege

conduct so outrageous in character and so extreme in degree to go beyond all possible bounds of decency as required by Florida law. Mundy v. Southern Bell Telephone and Telegraph Company 676 F2d 503 (CA 11 Ga. 1982). Therefore, Plaintiff's intentional infliction of emotional distress claim cannot survive Defendant's motion for summary judgment.

In addition, Plaintiff has failed to bear his Celeotex burden with regard to the breach of contract claim. Defendant presents affidavits, including that of Plaintiff, which indicate that Plaintiff received final payment of all services under his contract and released any claim thereunder and that Plaintiff made undocumented loans to the claims supervisor which provided cause for termination.

Plaintiff JOE ALLEN BAKER simply

has not met its Celotex burden as to any of the claims. Plaintiff has failed to come forward with "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Therefore, it is

ORDERED AND ADJUDGED that motion of Defendants for summary judgment against Plaintiff JOE ALLEN BAKER is hereby GRANTED.

DONE AND ORDERED this 30 day of Nov, 1990.

/s

NORMAN C. ROETTGER, JR.

UNITED STATES DISTRICT COURT JUDGE

cc: counsel of record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

_____

No. 91-5068

_____

[STAMPED AS "FILED, JUN 26 1992"]

JOE ALLEN BAKER, M.D.,

Plaintiff-Appellant,

versus

GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN WESTERN FOOD PRODUCTS CO., RISK MANAGEMENT SERVICES, INC., FRANK B. HALL, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

x

Before: HATCHETT, Circuit Judge, JOHNSON and HENDERSON*, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit

Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s Joseph W. Hatchett

UNITED STATES CIRCUIT JUDGE

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

JOE ALLEN BAKER, M.D.,

Plaintiff,

v.

GULF WESTERN INDUSTRIES, INC., etc., et al.

Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.:88-8188-CIV-ROETTGER

FINAL JUDGMENT

THIS CAUSE before the Court on motion by Plaintiff to amend complaint. Plaintiff's motion comes six years after the suit was filed. Upon consideration of the motion and the record in this cause, it is

ORDERED AND ADJUDGED that the motion by Plaintiff to amend complaint is hereby DENIED.

FURTHER ORDERED AND ADJUDGED that the Court having granted Defendant's motion for summary judgment

under Rule 56 of the Federal Rules of Civil Procedure now enters judgment for Defendant and Plaintiff shall take nothing by his suit. Defendant to go hence without day.

DONE AND ORDERED this 28 day of Dec, 1990.

/s

NORMAN C. ROETTGER, JR.

UNITED STATES DISTRICT COURT JUDGE

cc: counsel of record